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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA, ) 2:09-cr-00395-ECR-PAL  
11 ) 2:10-cv-01761-ECR  
12 Plaintiff, )  
13 vs. ) ORDER  
14 RAFAEL ROJO-MAYA, )  
15 Defendant. )  
16 \_\_\_\_\_

17 On March 31, 2011, Defendant Rojo-Maya filed an Amended Motion  
18 (#47) to Vacate, Set Aside or Correct Sentence by a person in federal custody.  
19 The Government filed an opposition (#49) to the motion on April 20, 2011.

20 The amended motion is based upon Defendant's claim that his counsel was  
21 ineffective at sentencing for failure to raise "cultural assimilation" as a basis for  
22 departure.

23 In considering Defendant's motion, we first review the question of whether  
24 there is any reasonable likelihood that had Defendant's attorney contended for a  
25 departure based on cultural assimilation it would have resulted in a departure.

26 At the time Defendant was sentenced, March 17, 2010, the 2009 United  
27 States Sentencing Guidelines ("U.S.S.G.") were in effect. It does not appear that  
28 at that time there was any specific Guideline permitting departure on the basis of

1 cultural assimilation on an unlawful reentry charge. However, at the of  
2 Defendant's sentencing, cultural assimilation was well recognized as a basis for  
3 departure or variance by Ninth Circuit jurisprudence.

4 The Ninth Circuit case of United States v. Rivas-Gonzalez, 384 F.3d 1034  
5 (9th Cir. 2004), held cultural assimilation to be the basis for departure must occur  
6 after defendant has legally entered this country. Cultural assimilation as a basis  
7 for departure may not be asserted if it occurs after an illegal entry. The Pre-  
8 Sentence Report indicates that Defendant moved from Mexico to Las Vegas,  
9 Nevada, in 1996 to seek employment opportunities. He was then 19 years of age.  
10 The record does not disclose if that entry was legal or illegal, but the fact that  
11 Defendant subsequently obtained a permanent residence card in 1999 is possible  
12 evidence that his original entry might have been lawful. Defendant was  
13 subsequently deported to Mexico on March 18, 2003, after a conviction in the  
14 Southern District of California for importation of marijuana. While cultural  
15 assimilation during the period of 1996 - 2003 could have been after a lawful  
16 entry, cultural assimilation claimed for any time after 2003 cannot be counted.  
17 There is therefore a period of 7 years when cultural assimilation could have  
18 occurred when Defendant was between ages 19 and 26. Incidentally, we note  
19 that children who are brought across the border unlawfully by their parents are  
20 usually exempted from the rule of no cultural assimilation unless there has been a  
21 lawful entry. Defendant would not qualify for that exemption however because  
22 he came to the United States at age 19 on his own to seek employment.

23 Some of the other tests for cultural assimilation which were used at the  
24 time of Defendant's sentencing were:

25 (1) *Extraordinary circumstances*. Such do not appear to exist in this  
26 case.

27 (2) *Defendant was a de facto American citizen and is being punished by*  
28 *being banished from "his" country*. Defendant, all in all, does not

1 meet the test.

2 (3) *Defendant's entry was due to familial and custodial ties, rather than*  
3 *economic.* Defendant had a wife and child residing in the United  
4 States at the time of his illegal reentry in 2005 and may benefit from  
5 this test.

6 (4) *Defendant had unusual cultural or family or community ties to the*  
7 *United States.* There is no evidence to indicate any such ties  
8 existed.

9 (5) *Defendant had children in United States schools.* In this case, with  
10 a child born approximately in the year 2001, Defendant may have  
11 had a child in school at the time he was sentenced.

12 (6) *Defendant speaks English.* An interpreter was sworn and translated  
13 the sentencing proceedings from English to Spanish for the  
14 Defendant. It appears Defendant does not speak or adequately  
15 understand English to any reasonable degree.

16 (7) *Defendant has a history of employment in the United States.* There  
17 is no evidence one way or the other in the record with respect to this  
18 test.

19 (8) *Defendant's community activities.* There is no evidence of any  
20 community activities by Defendant in this country.

21 (9) *Defendant's substantial recent criminal violations.* Cultural  
22 assimilation even with the underworld may be considered cultural  
23 assimilation if it is general criminal activity of American-style as  
24 opposed to Mexican-style.

25 Arrests may be taken into consideration as negative factors in the  
26 mix in determining whether defendant is culturally assimilated.  
27 Here, Defendant does have several reasonably recent criminal  
28 convictions, including in 2002 importation of marijuana, in 2005

1           disturbing the peace involving batteries on his wife, in 2007  
2           coercion also involving batteries on his wife, and in 2007 D.U.I.  
3           Defendant was, at the time of his sentencing here, pending  
4           sentencing in Nevada State Court for trafficking in a controlled  
5           substance, cocaine. He had previously entered a plea of guilty.

6           Defendant also suffered an arrest for domestic battery in 2000,  
7           with prosecution denied.

8           (10) *Defendant was educated in the United States.* All of Defendant's  
9           formal education through the 12<sup>th</sup> grade occurred in Mexico.

10          (11) There is no evidence to support a claim of cultural assimilation on  
11          the basis of Defendant's interest in the performing arts, American  
12          culture or friendship with Americans.

13          (12) Defendant's age of 19 at his first entry suggests he was not  
14          culturally assimilated at the time he was sentenced but rather that his  
15          cultural assimilation was with his native Mexico.

16          Taking all of the above factors into consideration, it is unlikely that  
17          evidence of cultural assimilation would have affected Defendant's sentence.

18          Although it appears it was adopted after Defendant was sentenced,  
19          Application Note 8 to U.S.S.G. 2L1.2 is helpful in testing whether Defendant  
20          would have had any reasonable case for cultural assimilation that would have  
21          likely affected his sentence. The Application Note 8 largely tracks the  
22          preexisting case law as of the time Defendant was sentenced.

23          Under this Application Note, such a departure should be considered only  
24          in cases where:

25          (A) The defendant formed cultural ties primarily with the United States  
26          from having resided continuously in the United States since  
27          childhood. Defendant cannot meet this test.

28          (B) Those cultural ties provided the primary motivation for the

1 defendant's illegal reentry or continued presence in the United  
2 States. There is no evidence that Defendant originally entered this  
3 country because of cultural ties; he came to seek employment.  
4 There is some evidence he may have reentered in 2005 and remained  
5 here because of his wife and child. However, familial ties  
6 themselves are not sufficient to meet the test of cultural assimilation.

7 We conclude that Defendant could not have met this "only" test.  
8 The U.S.S.G. 2L1.2 Application Note 8 includes additional considerations:

- 9 (1) *The age in childhood at which defendant began residing*  
10 *continuously in the United States.* Defendant came to this country at  
11 age 19, as an adult, after childhood.
- 12 (2) *Whether and for how long defendant attended school in the United*  
13 *States.* Defendant completed school in Mexico before he entered  
14 this country. He never attended school in the United States.
- 15 (3) *The duration of defendant's continued residence in the United*  
16 *States.* We count 1996 -2003 and 2005 -2010. This is 12 years.
- 17 (4) *The duration of defendant's presence outside the United States.*  
18 Defendant resided in Mexico for 21 years.
- 19 (5) *The nature and extent of defendant's familial and cultural ties*  
20 *outside the United States.* Defendant's parents reside in Mexico; his  
21 father owns a restaurant there and his mother is a homemaker.  
22 Defendant has three adult siblings, all of whom reside in Mexico.  
23 Defendant had a good childhood in Mexico; all of his necessities  
24 were met there. The Pre-Sentence Report states that Defendant told  
25 the probation officer that his wife and family were, at the time of  
26 sentencing, awaiting his release to return to Mexico where the  
27 family will reside once he was deported.
- 28 (6) *The seriousness of defendant's criminal history.* As set forth above,

1 Defendant has a serious criminal history. He was a Criminal History  
 2 Category III under the Sentencing Guidelines (U.S.S.G.) at the time  
 3 of sentencing.

4 (7) *Whether defendant engaged in additional criminal activity after*  
 5 *reentering the United States.* Defendant had misdemeanor  
 6 convictions both involving domestic battery after 2005 when he  
 7 returned to the United States. These occurred in 2005 and 2007. He  
 8 also had a D.U.I. conviction in 2007, and a trafficking in controlled  
 9 substance plea of guilty awaiting sentencing in 2009. Defendant did  
 10 engage in additional criminal activity after returning to the United  
 11 States unlawfully in 2005.

12 Defendant substantially fails each of these seven considerations contained  
 13 in the present Guidelines.

14 It is clear that cultural assimilation could not have been reasonably argued  
 15 as a basis for departure at Defendant's sentencing hearing. Raising the issue  
 16 could have resulted in calling to the Court's attention many negative things  
 17 concerning Defendant's status and conduct. Such could have detracted from  
 18 counsel's other arguments presented at sentencing.

19 Failing to present a claim of cultural assimilation could not be considered  
 20 to constitute ineffective assistance of counsel.

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1 IT IS THEREFORE ORDERED that Defendant's Amended Motion (# 47)  
2 pursuant to 28 U.S.C. § 2255 is DENIED.

3 The Court finds that an appeal from this order would be meritless. We  
4 therefore, deny a certificate of appealability.

5 The Clerk shall enter judgment accordingly.

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7 Dated this 23<sup>rd</sup> day of September 2011.

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10 EDWARD C. REED, JR.  
11 United States District Judge  
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